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CLERK

No. 01-625

IN THE

Supreme Court of the United States

CLIFFORD J. JOHNSON,

Petitioner,

v.

THE BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY, CEDRIC BENNETT, JOHN SACK and ROBERT STREET,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT

BRIEF IN OPPOSITION

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INTRODUCTION

This petition for certiorari should be denied because it presents no federal question, let alone a question of such transcendent and immediate national importance as to warrant intervention by this Court. This is a fact-bound case that turns upon California state law issues — the evidentiary standards for the judicial confirmation of settlements — which this Court lacks jurisdiction to review. In essence, petitioner impermissibly asks this Court to reweigh the record and issue an advisory opinion as to whether the settlement may impinge upon unexercised rights in hypothetical situations. That is not the function of this Court under our system of federalism.

STATEMENT OF JURISDICTION

This court has no jurisdictional authority to grant this petition under 28 U.S.C. section 1257(a). The opinion for which review is sought does not question the validity of a statute or treaty of the United States, does not draw the validity of a state statute into question on the ground of repugnancy to the Constitution, treaties or laws of the United States and, as it was based entirely on state law, does not raise a federal question. This is discussed further on page 7, "Reasons for Denying the Writ."

STATEMENT OF THE CASE

This appeal arose from petitioner Clifford Johnson's anger at not being able to renege on a negotiated settlement of all of his claims against his former employer, respondent Stanford University, and then to receive an additional $25,000 to settle his federal claims. When Stanford refused this demand and successfully moved for entry of judgment on

the settlement, petitioner appealed numerous rulings, lost on all issues, lost on his demand for rehearing and lost on his petition for review by the California Supreme Court. Now he seeks certiorari.

Petitioner's wrongful termination action against Stanford was settled in a court-supervised conference on December 11, 1998. (Petition, Appendix 4, pp. 39-40.) At the court's suggestion, the parties put the terms of the settlement on the record, including the following:

> Plaintiff, Mr. Johnson, hereby releases any and all claims whether asserted or unasserted, known or unknown, which he now or ever has against the releasees.
>
> Mr. Johnson further waives the benefits of section 1542 of the California Civil Code in exchange for this release.

(Petn., App. 4, p. 40.)

The court repeatedly confirmed Mr. Johnson's approval of the settlement terms, including the provision that the terms of the agreement be kept confidential. The court asked him, "Mr. Johnson, does that fully state your understanding?" Johnson answered, "Yes," and then asked a question about a nuance of the confidentiality provision. After a discussion of that point, Johnson said, "Agreed." (Petn., App. 4, p. 41.) The court then questioned Johnson for a second time, as follows:

THE COURT: You heard the terms, Mr. Johnson. Do you understand them?

MR. JOHNSON: Yes.

THE COURT: Do you agree to be bound by them?

MR. JOHNSON: Yes.

(*Ibid.*) After obtaining the same assurances from Stanford, the court declared the agreement to be a "judicially supervised settlement" with the court's "stamp of approval" on it. (*Ibid.*)

Approximately two weeks later, Johnson wrote to counsel for Stanford, recited a few of his grievances, announced that he had drafted a complaint against Stanford for violation of the federal False Claims Act ("FCA"), 31 U.S.C. section 3730, and for retaliation, and demanded an extra payment to prevent him from filing the complaint and what he himself called "further and further-fetched litigation." (Petn., App. 4, p. 41, and see Appendix to Appeal, Vol. IX, 2158-2159, especially 2157, n.4. Hereafter, the record will be referred to by volume and page numbers.)

Stanford refused to pay any additional money and pointed out that the settlement agreement released Johnson's rights to bring additional claims, expressly including any sort of retaliation claim against Stanford. (Vol. IX, 2142-2143.) Stanford then moved to confirm the settlement and for entry of judgment. (Petn., App. 4, p. 42.)

In response, Johnson submitted his own sworn declaration, asserting under penalty of perjury that he had *never* intended to release *all* claims against Stanford – which was precisely what he assured the court, on the record, that he was agreeing to do – but that he had planned for weeks to

settle only the state claims and then later demand an additional $50,000 (although he was willing to accept $25,000) to drop the federal claims. (Vol. IX, 2196:3-11; 2190:23-25; 2191:13-21; 2193:14-17.)

In this amazing declaration, in which Johnson asserts that he had absolutely no intention of releasing his federal claims, he stated:

> . . . [G]iven that I was seeking only a further $25,000 monetary satisfaction, I hoped that I need do no more than draft a federal claims complaint, using my already drawn allegations of multi-million dollar federal claims act violations. A threat to file the draft should suffice to conclude the settlement. . . .

(Vol. IX, 2195:1-6; 2195:12-13.)

In opposing the motion to confirm, Johnson essentially argued that his "undisclosed intent" not to settle any federal claims *while falsely attesting to the court that he was releasing "any and all claims"* justified rescission of the settlement agreement on the grounds of "no mutuality." (*See, e.g.*, Vol. IX, 2167:2-6.) He also argued that the release of "any and all claims" could not have included any FCA claims because some of them are nonwaivable as a matter of law (Vol. IX, 2257:12-25), overlooking the fact that he, himself, had been attempting a few days earlier to release those same FCA claims for $25,000, as set forth above.

The court did not accept any of these arguments as a basis for rescission and confirmed the settlement, as follows:

> . . . I think the material terms of the settlement are not in dispute. [Johnson] agreed to dismiss the case . . . and agreed to provide the release of the claims that he had asserted, and those that were unasserted, that are known or unknown.
>
> And I think the undisclosed intentions of a party would not be relevant; the parties both manifested an intent to settle this dispute. If there are claims that one cannot waive as a matter of public policy, then they have not been waived. And that would not, in any way, void this settlement in its entirety.
>
> There's a strong public policy to settle cases. The case is settled. If the qui tam or some other unwaivable claim is out there then it can be pursued. I'm not going to pass judgment on it.

(Petn., App. 1, p. 30.) Judgment was then entered on the terms of the settlement pursuant to Code of Civil Procedure section 664.6. (Petn., App. 1, p. 31.) Johnson's motion for new trial was denied, as was his motion to set aside that denial. (Petn., App. 4, p. 43.)

Petitioner then appealed to the Sixth Appellate District, which affirmed the judgment. (Petn., App. 4.) Beginning its analysis by noting that the "proper standard of review, . . . is whether the trial court's ruling was supported by substantial evidence," the court reviewed the voluminous record and found that it "clearly and compellingly reflects that [petitioner] was aware of and understood the terms of the settlement agreement," and that he had given his "unambiguous consent" to the settlement and to the

confidentiality provisions. (Petn., App. 4, p. 52.) In response to petitioner's argument that he had not "understood" that federal claims as well as state claims were being released, the court explained again the requirements for entry of judgment under section 664.6, as follows:

> [Petitioner] misconceives the court's role. It was required to decide whether the parties had outwardly manifested their consent to the settlement terms. The record reflects that [petitioner] expressly stated that he understood and agreed to the terms of the settlement that had been stated on the record before the court. One term was that [petitioner] waived *all* claims against defendants. As the court noted, is a claim was not waivable, this settlement term would not result in waiver of that claim. [Petitoner's] subjective understanding of whether or not he given up his federal claims was irrelevant because he had outwardly manifested an intent to waive all claims. This outward manifestation amply supported the court's finding that the parties had agreed to the settlement terms.

(Petn., App. 4, p. 51.) Similarly, the court found that "No 'illegality' was involved in [petitioner's] knowing and voluntary agreement to the nondisclosure obligation. . . ." (Petn., App. 4, p. 52.) The court's conclusion on this point, and the basis for its affirmation, was plain and simple: "The court's entry of judgment on the settlement agreement was supported by substantial evidence." (*Ibid.*)

After unsuccessfully seeking rehearing from the court of appeal (Petn., App. 5), petitioner sought review by the California Supreme Court. The petition for review was denied summarily. (Petn., App. 6.) This petition for certiorari followed.

REASONS FOR DENYING THE WRIT

A. This Court Does Not Have Jurisdiction To Hear this Matter

The jurisdiction of the Supreme Court to review decisions of the state courts is codified at 28 U.S.C. section 1257, which provides that final judgments rendered by the highest court of a state in which a decision could be had may only be reviewed in three situations:

> (1) where the validity of a treaty or statute of the United States is drawn in question;
>
> (2) where the validity of a statute of any state is drawn in question on the ground of it being repugnant to the Constitution, treaties or laws of the United States, or
>
> (3) where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a). A glance at petitioner's "Questions Presented" shows that none of these applies here. There is no question as to the validity of a treaty or a statute, federal or state, and no federal question is raised.

The ruling which petitioner challenged in the lower courts and now attempts to challenge here is an order made pursuant to California Code of Civil Procedure section 664.6, which sets forth the evidentiary and procedural bases a court must find before entering judgment on a settlement. The standard set by this statute is substantial, objective evidence of understanding and mutual consent. *Fiore v. Alvord* (1985) 182 Cal. App.3d 561, 565; *Weddington Productions, Inc. v. Flick* (1998) 60 Cal. App. 4th 793, 810-11.

Both the trial court and the intermediate court of appeal found this standard had been amply met. (Petn., App. 1, p. 30; App. 4, pp. 49-52.) That was it. No federal question arose from the determination as to whether there had been a sufficient showing of objective evidence of consent.

As to petitioner's allegations about the hypothetical future "deterrence" of FCA claims and reporting, no provisions referring to such claims were included in the courts' orders. If these vague concerns about hypothetical future problems are petitioner's notion of a "federal question" sufficient to trigger this Court's jurisdiction, he is mistaken. These alleged concerns did not shape either lower court's determination as to whether judgment should be entered. If anything, they were seen as non-issues — as set forth above, both courts assured petitioner that non-waivable claims cannot be waived, the superior court stated that any limitation on the filing of future actions would go to the scope of the agreement underlying the judgment, not its validity, and the settlement agreement itself provided that the confidential terms could be made available (as to an interested government agency) through legal process. (Petn., App. 1, p. 30; App. 2, p. 34; App 4., pp. 51.)

The sole determinant in the decision was whether the evidence met the evidentiary standards for confirmation of settlement and entry of judgment under a California statute. As no federal question was both raised and decided in the state court below, this Court is without jurisdiction to review this matter. *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S. Ct. 1161, 1162-63 (1969), citing *Crowell v. Randell*, 10 Pet. 368, 391, 9 L. Ed. 458 (1836). Even if a federal question of some sort had also been decided, which is denied, the California statutory ground would still suffice as an independent and adequate basis for the decision, and this Court would be without jurisdiction. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 56 S. Ct. 183, 184 (1935). This petition should be denied.

B. Neither the Record nor the Decisions Below Raises the Questions Presented by the Petition

The first of petitioner's "Questions Presented" is "*If*, to enforce a private contract, a (state) court issues an order that operates to deter the filing of prospective claims under the False Claims Act, without the government having been informed, is the order void as against public policy?" (Petn., p. i, emphasis added.) Significantly, petitioner does *not* seek review of a dismissal by any court of any such claim on the ground that he waived the right to bring such a claim when he settled his employment dispute. In fact, petitioner has never filed any such claim.

Moreover, as to petitioner, this question is moot. The only allegations he has threatened to raise in an FCA claim describe events occurring between 1984 and 1992 and have long been time-barred, as the FCA statute of limitations is six years from the alleged violation or three years from notice. 31 U.S.C. § 3731(b). (Vol. VII, 1753-1758.)

His second question is similar: "*If*, to enforce a private contract, a (state) court issues an order that operates to deter the reporting of any information that might be of interest to federal regulatory agencies, is the order void as against public policy?" (Petn., p. i., emphasis added.) Once again, petitioner does *not* seek review of a ruling of any court which has prohibited him from communicating with a government official (or anyone else) on the ground that he released that right in the same settlement. In fact, no such injunction has ever been sought by respondent or rendered against petitioner.

As his first purported "reason" why his petition should be granted, petitioner argues that these two questions are "simply and surely raised" because, in his words, "what you see is what you get." (Petn., p. 24.) What we see and what we get here is nothing more than a request for an advisory opinion from this court as to whether such rulings might be void as against public policy in the event that some court, some day, might issue them against someone under unknown circumstances. Offering speculative advisory opinions about hypothetical unfiled lawsuits and unissued rulings is not the business of this court. *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 101, 118 S. Ct. 1003, 1016 (1998); *Hayburn's Case*, 2 Dall. 408, 1 L. Ed. 436 (1792).

C. The State Has Not Decided Issues of Confidentiality Contrary to Applicable Federal Law

As his second purported reason why the petition should be granted, petitioner contends that the issue of whether courts can enforce terms that deter communications of possible interest to regulatory agencies is "an unsettled question of importance" and that "the state," presumably the

State of California, has decided this question contrary to applicable federal law.

Once again, the hypothetical nature of the inquiry is clear. Petitioner does not claim, and the facts certainly do not demonstrate, that any lower court has ever "enforced terms" which prevented him from speaking to a governmental agency because of the settlement of his employment dispute with Stanford. *If this issue is of interest to this court, this is not the vehicle for its consideration.*

Petitioner's purported concern about mythical gag orders apparently arises from the fact that the settlement agreement at issue here – between a private individual and a private university, not involving a matter of public security or public interest – contained a confidentiality provision as to certain terms. (Petn., App. 2.) There are two significant facts about this provision of the agreement.

First, petitioner never objected in the trial court to holding certain terms confidential (not even when he discussed a nuance of the provision with the court before agreeing to it on the record), nor did he object to entry of two sealing orders which help protect that confidentiality. (Vol. IX, 2109:23-2110:2; 2181:25-17, 2255:14-17; 2276.) The court of appeal specifically noted his knowing consent, on the record, to the confidentiality provision. (Petn., App. 4, p. 52.) This inaction below constitutes a waiver of any right of appeal. "It is the universal rule that a judgment or order will not be disturbed on appeal prosecuted by a party who has expressly consented to the making thereof." *Hibernia Savings & Loan Society v. Waymire* (1907) 152 Cal. 286, 287 (citing cases dating as far back as 1856), *accord*, Cal. Civ. Code § 3515 ("He who consents to an act is not wronged by it.").

Secondly, the confidentiality provision applies only to the *terms of the settlement itself* and expressly allows petitioner to disclose the terms if "compelled by legal process to do so." (Petn., App. 2, p. 34.) Why any federal regulatory agency would be interested in the details of the few terms held confidential in this settlement of this private employment dispute – *a dispute in which no FCA claims were litigated* – is unimaginable, but if the government ever became interested, it would be able to obtain whatever information it wanted. As the Sixth Appellate District noted in its opinion in this matter, the sealing of these terms was "narrowly tailored," and was "clearly the least restrictive means available to ensure the confidentiality." (Petn., App. 4, p. 49.) The court also noted that "[Petitioner] fails to define any 'public interest' which would be abrogated by his agreement to the nondisclosure term. . . ." (Petn., App. 4, p. 52.)

Further, petitioner has not cited any cases showing a conflict between the holdings of California courts and federal courts on this issue. The only authorities cited by petitioner in support of this purported "reason" for granting review are two newspaper articles full of hearsay and editorializing, his own opinion about what "this state evidently takes for granted" in personal injury litigation, and two cases, *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 114 S. Ct. 1192 (1994) and *Cariveau v. Halferty* (2000) 83 Cal. App. 4th 126.

Petitioner's reference to *Digital Equipment* is pointless. *Digital Equipment* did not "decisively hold," as petitioner incorrectly claims at page 25, that certain rights outweigh policy interests in the voluntary resolution of disputes. Instead, the entire opinion dealt with one of the fine points

of appellate procedure, the "finality" requirement for appeals of right under 28 U.S.C. section 1291 as applied to collateral orders, and its only holding was as follows: "We hold that an order denying effect to a settlement agreement does not come within the narrow ambit of collateral orders." *Id.*, 511 U.S. at 865, 114 S. Ct. at 1994.

Cariveau, supra, is equally irrelevant. The case had nothing to do with an agreement to keep the *terms of a settlement* confidential, but instead struck down a specific "forebearance agreement" which explicitly forbade a defrauded client from disclosing a stockbroker's *misconduct* to any law enforcement or regulatory agency in stark violation of the broker's duties to her settling client as well as to her employer and her professional licensing and regulatory boards. No such provision was included in the settlement agreement at issue here.

Petitioner has not shown that any court has enforced the narrowly tailored provision at issue to prevent him from speaking to anyone, or that any California court has issued a single ruling which conflicts with the holdings of federal courts on questions of confidential settlements.

D. This State Has Not Taken a Position Contrary to Federal Law on Waivers of FCA Claims

As his third and final purported "reason" why the petition should be granted, petitioner claims that "whether courts can enforce terms that generally deter the filing of FCA claims, without the government being informed, is an unsettled question of importance, which the state has decided counter to applicable federal law." (Petn., p. 27.) Again, petitioner's argument is pointless: no court has halted petitioner's filing

of such an action, there is nothing "unsettled" about whether such deterrence is permissible, and not a single California decision conflicting with federal decisions on point is cited.

Both the superior court and the court of appeal advised petitioner – who argued that FCA claims are nonwaivable as a matter of law – that if a claim is nonwaivable, this settlement would not waive that claim. (Petn., App. 1, p. 30; App. 4, p. 51.) The applicable case authorities fully support the actions of these two courts. *See, e.g., Town of Newton v. Rummery*, 480 U.S. 386, 391, 107 S. Ct. 1187, 1191 (1987). Not only did the courts in *this* matter fully comport with federal law on this point, petitioner does not cite *any* conflicting California authority. In fact, he does not even cite any *California state* authorities at all.

Petitioner relies on four authorities, one from a federal court in California and three from elsewhere, to support his notion that California courts are both wrong on the waivability of FCA claims and in conflict with federal courts on that issue. The California case is *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953 (9th Cir. 1995), which, as petitioner correctly notes, found that a prefiling release of a *qui tam* claim under the FCA, when entered into without the consent or knowledge of the United States, cannot act as a bar to the subsequent filing of that *qui tam* claim. *Id.* at 969.

Petitioner's next case is a Ninth Circuit decision from Washington state, *United States ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230 (9th Cir. 1997), that leads to a different result, but relies upon *Green* and is thoroughly consistent with it. There is no conflict here and petitioner's claim that the *Hall* court considered "overruling" *Green* is

simply false. (Petn., 28.) *Green* and *Hall both* based their decisions on an analysis of the public interests underlying the FCA *qui tam* provisions, and the critical importance of the government's knowledge of the allegations being made in such claims. In *Green*, where the government had never been advised of the yet-unfiled claim, the court would not allow it to be waived by the settlement of other claims; in *Hall*, where the government was well informed about the claim, had investigated the matter and declined to proceed, the court concluded that the public interest in the use of *qui tam* suits to supplement federal enforcement of the FCA would not be harmed, and allowed the settlement to act as a waiver. *Hall*, *supra*, 104 F.3d at 233.

Two other non-California cases which, one presumes, petitioner cited as "proof" of the alleged conflict regarding FCA claims, are a district court case from the Northern District of Ohio and a decision of this Court. Neither has any relevance here. The first, *Nguyen v. City of Cleveland*, 121 F. Supp.2d 643 (N.D.Ohio 2000), an employment retaliation action filed after a FCA "whistleblower" lost his job, says nothing whatsoever about whether FCA claims are waivable. The second, *United States v. Mezzanato*, 513 U.S. 196, 199-201, 115 S. Ct. 797, 801-802 (1995), a criminal matter, noted that legal rights generally and evidentiary rights specifically are subject to waiver by voluntary agreement of the parties, but never even mentioned FCA claims. Petitioner has shown neither error by California courts nor conflict with other courts, and this petition should be denied.

CONCLUSION

This court has no jurisdiction to review this request for an advisory opinion regarding hypothetical questions, as no federal question is presented. There is no showing that California courts are in error with regard to the nonwaivability of certain federal claims or with regard to confidential settlements, nor that the California courts are in conflict with federal courts on these issues. This petition should be denied.

Respectfully submitted,

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